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No.

In The

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1984

JAMES A. AUKAMP,
Petitioner,

v.

STATE OF MARYLAND
Respondent.

PETITION FOR WRIT OF CERTIORARI

TO THE COURT OF SPECIAL APPEALS OF MARYLAND

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QUESTIONS PRESENTED

1. Was evidence provided by an accomplice inadmissible where the arrest resulted from an unlawful search of Defendant's car, where cooperation was obtained by exploiting that search, and where the State failed to show any independent cause which broke the chain of causation between the unlawful search and the accomplice's cooperation ?

2. Did the accomplice's "conversion to Christ" constitute an independent cause sufficient to attenuate the taint of the illegal search, where the "conversion" was the direct and immediate result of police exploitation of the illegal search and would not have occurred without the search ?

3. Was corroboration of the accomplice's testimony sufficient where it consisted of seeing the accused (unaccompanied by the accomplice), months earlier, in the same public wildlife area where marijuana was growing ?

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43 ALR 3d 385

In the

SUPREME COURT OF THE UNITED STATES

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No.

JAMES A. AUKAMP,
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v.

STATE OF MARYLAND
Respondent

PETITION FOR WRIT OF CERTIORARI TO THE COURT OF SPECIAL APPEALS OF MARYLAND

TO THE HONORABLE, THE CHIEF JUSTICE and ASSOCIATE JUSTICES of the Supreme Court of the United States:

James A. Aukamp, Defendant-Petitioner herein, prays that a writ of certiorari issue to review the decision of the Court of Special Appeals of Maryland affirming the Petitioner's conviction of

possession of marijuana, possession with intent to distribute marijuana and unlawful hunting on July 19, 1983.

OPINIONS BELOW

The Order of the Court of Appeals of Maryland denying certiorari is printed in the Appendix hereto, infra, at page 31. The unreported per curiam opinion of the Court of Special Appeals of Maryland is also printed in the Appendix, infra at page 32. The trial court's ruling on the admissibility of the accomplice's testimony is excerpted from the trial trancript and appears infra at page 47. The trial court's ruling which suppressed the evidence obtained during the search is printed at page 50, infra, as an excerpt from the suppression hearing transcript. Defendant's Motion to Suppress Evidence appears at page 56 of the appendix hereto.

PERTINENT CONSTITUTIONAL PROVISIONS

Constitution of the United States

Amendment IV

The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no warrants shall issue, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

Amendment V

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger, nor shall any person be subject for the same offense to be twice

put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty or property, without due process of law; nor shall private property be taken for public use, without just compensation.

JURISDICTION

On July 19, 1983, Defendant-Petitioner Aukamp was convicted by a jury in the Circuit Court for Kent County, Maryland of possession of marijuana, possession with intent to distribute marijuana and unlawful hunting. On September 19, 1983 he was sentenced to 4 years in prison, with 3 years suspended; 5 years supervised probation and fined $3,200.00. A timely appeal to the Court of Special Appeals of Maryland was filed and that court affirmed in an unreported per curiam opinion on June 19, 1984. (Appendix, p. 32)

The Maryland Court of Appeals denied a timely petition for certiorari on October 31, 1984 (Appendix, p. 31).

The jurisdiction of this Court is invoked under 28 U.S.C. §1257(3).

The unlawfulness of the search of Defendant's car, the seizure of articles therefrom and Defendant's arrest was first raised by Motion to Suppress at the trial level (Appendix, p. 56) The unlawfulness of the warrantless search, seizure and arrest and the use of tainted evidence were the focus of Defendant's appeals to the Court of Special Appeals and Court of Appeals of Maryland.

STATEMENT OF FACTS

At noon on October 14, 1982, Kent County Deputy Sheriff John W. Thorpe received a tip via the Harford County, Maryland Sheriff's Department that a large plot of marijuana was growing

in Zone 5 of the Millington Wildlife Area. Deputy Thorpe contacted Officer Charles Rhodes of the Natural Resources Police and arranged to investigate the area. Officer Rhodes drove to the wildlife area office at 2:00 P.M. to get maps. He observed a green Oldsmobile parked near Zone 5 and two people walking into the woods carrying firearms.

At about 4:30 that afternoon, both Officer Thorpe and Officer Rhodes drove out to Zone 5 and searched for marijuana. The search was unsuccessful. The officers drove to where Rhodes had seen the Oldsmobile earlier and found that it was still there. On foot, Officer Thorpe approached the locked car and looked at its contents through the windows.

The officers left and continued, again unsuccessfully, to search for marijuana growing in Zone 5.

At about 7:00 P.M. they returned

to the parked Oldsmobile and proceeded to the next parking area about 75 yards away, where they would not be visible, until they heard a shot in the woods. Several minutes later, they heard Defendant-Petitioner Aukamp and Steven Latham slamming doors of the Oldsmobile. The officers drove over to the Oldsmobile, left their Jeep with the headlights shining in the direction of the Oldsmobile, identified themselves, and Officer Rhodes began a hunting license check. Officer Thorpe then walked around to the back door of the car, over Aukamp's objection, and seized a brown paper bag. Officer Thorpe then arrested both Aukamp and Steven Latham for controlled dangerous substances violations.

At about 5:00 the next morning, Aukamp and Latham were taken before a Commissioner and bond was set in an amount in excess of $40,000 apiece.

About two hours later, police questioned both Aukamp and Latham and both were essentially non-cooperative.

The two were then facing 36 years in prison and $70,000 in fines. At 5:30 that same evening, October 15, 1982, Latham led police to several patches of marijuana growing in Zone 5 and made statements inculpating Aukamp.

Latham's bail was then reduced to $10,000 on October 18; he posted bond and was released on October 19, 1982.

On February 18, 1983, Latham entered a guilty plea to four counts and a not-guilty plea to the remaining five counts. After the guilty plea, the State of Maryland agreed to nol pros the not-guilty charges and Latham's maximum was six years, 3 months and $17,000 in fines. Latham's sentencing was postponed until after he testified against Aukamp.

On April 12, 1983, the Circuit Court

for Kent County (Hon.George B. Rasin, Jr. presiding) held a suppression hearing. Upon hearing testimony of both police officers and Latham, the Court suppressed all of the evidence seized as a result of Officer Thorpe's entry into Aukamp's vehicle, because it had been unlawfully seized.

As a result of Latham's testimony and the evidence he furnished to police, Aukamp was found guilty of possession of marijuana and possession of a quantity sufficient to indicate intent to manufacture, distribute or dispense. Aukamp did not testify at his trial.

Latham's sentence for possession with intent to distribute and unlawful hunting was a suspended sentence, 5 years probation, and a $700 fine.

Aukamp's sentence for the same charges was a total of 4 years, with 3 years suspended, 5 years supervised

probation and a $3,200 fine.

REASONS FOR GRANTING THIS WRIT

Review by this Court is desirable and in the public interest; and is necessary to secure uniformity and consistency in search and seizure law and the exclusionary rule.

James Aukamp and Steven Latham were arrested as the result of an unlawful search and seizure. All of the evidence obtained in the course of that search and seizure was suppressed, and as such, beyond the contemplation of the jury at Mr. Aukamp's trial.

Nevertheless, after arrest and incarceration for almost twenty-four hours, facing trial on charges with penalties of over 36 years in prison and $70,000 in fines -- the result of the unlawful search and seizure -- Steven Latham led police to several patches of marijuana growing in the Millington

Wildlife Area. This new evidence along with Mr. Latham's subsequent testimony, have served to convict Petitioner Aukamp.

In the 1973 case of Ryon v. State, 29 Md. App. 62, 349 A. 2d 393 (1975), Judge Orth summarized the impact of Wong Sun v. United States, 371 U.S. 471 (1963); Miranda v. Arizona, 384 U.S. 436 (1966); Brown v. Illinois, 422 U.S. 590 (1975); and Michigan v. Tucker, 417 U.S. 433 (1974), on Maryland law regarding admissibility of evidence following an illegal search or arrest:

> Beginning with the initial premise that,
>
> The Fourth Amendment exclusionary rule applies equally to statements and tangible evidence obtained following an illegal arrest or an otherwise illegal search and seizure.

the Court goes on to note that "statements are not rendered admissible simply because the Miranda warnings were fully given" (because this is a Fourth Amendment, not Fifth Amendment test). Conversely, the

Court points out that such resulting evidence is "not rendered inadmissible simply because of the illegal arrest or unreasonable search and seizure".

In the final analysis, Judge Orth concluded that the admissibility of such evidence "must be answered on the facts of each case" by considering:

a) The threshhold question of the voluntariness of the statement (including Miranda compliance);

b) Whether the new evidence was obtained as a result of exploitation of the illegal conduct;

c) Other relevant factors, such as:

1. The temporal proximity of the arrest and confession;

2. the presence (or absence) of intervening circumstances;

3. The purpose and flagrancy of official misconduct.

a) Voluntariness:

The question of voluntariness of Latham's cooperation is best answered by considering the circumstances under which his decision was made. He was incarcerated, facing a number of serious charges, his bond was high, he had been separated from his co-defendant since their arrest the night before, and he had been questioned once already.

In Maryland,independent of Federal constitutional requirements, if the accused is told, or it is implied that making an inculpatory statement will be to his advantage, in that he will be given help or some special consideration, and he makes remarks in reliance on that inducement, his declaration will be considered to have been involuntarily made and therefore inadmissible. Hilliard v. State, 286 Md. 145, 406 A. 2d 415 (1979).

Furthermore, an involuntary confession

cannot be used for any purpose, even impeachment. Mincey v. Arizona, 437 U.S. 385 (1978).

Latham's cooperation is similar to that found in Keller v. State, 2 Md. App. 623, 236 A. 2d 313 (1967).

Keller's first statement was induced by police who indicated he could be granted immunity from prosecution if he became a witness for the State. That statement was clearly involuntary and inadmissible. However, less than 48 hours later, while still in jail, after consulting with an attorney who had negotiated an advantageous agreement with the state, Keller gave a second statement. The Court of Special Appeals held that the second statement would have "constituted the quintessence of voluntariness and been admissible if not made against the compelling background hich produced the first confession".

Here, too, Latham's cooperation would appear to have been freely given, if it had not been for the illegal search, seizure and arrest that generated it, as well as the fact that his sentencing hearing was scheduled and held the day after he testified against Aukamp.

b) Exploitation:

Thus, the central question to be addressed is whether or not his decision to cooperate was a result of the exploitation of the illegal search and arrest.

It is a common scenario in drug investigations to follow a strategy of "approach by increments" in which each step closer to the goal is justified by the results of the previous step. Each step generates the "reason" for the next step. In this investigation the officers had a tip of marijuana cultivation in a specific area of a game preserve. Upon proceeding to that area they inves-

tigated a car they saw there. They needed a "reason" to approach the occupants, so they oarked out of sight and when the occupants returned, their licenses were checked. The officers' presence near the car and Officer Thorpe's "observations" provided the "reasons" to search the car and, of course, the search provided the "reason for the arrest. Mr. Latham's incarceration at 7:30 P.M., his trip to the Commissioner at 5:00 A.M., his questioning at 7:00 A.M., his inability to make a $40,000 bail, his segregation from his co-defendant, ultimately culminated in his decision to cooperate with police. A typical scenario of a drug investigation -- one which is frequently successful -- each step justifies the next. The problem arises when one of the "steps" is illegal.

Even though the court determined the search to be illegal, its role in the overall scheme of the investigation must

be considered. In so doing, it becomes clear that each step in the investigation relied on the step before.

The Maryland Court of Special Appeals in Ryon v. State, 29 Md. App. 62, 349 A. 2d 393, adopted the language of Wong Sun v. United States, 371 U.S. 471 (1963), where the central question to be considered was enunciated:

> whether, granting establishment of the primary illegality, the evidence to which instant objection is made has been come at by exploitation of that illegality or instead by means sufficiently distinguishable to be purged of the primary taint.

To incarcerate an individual for possession of the fruits of a search is to exploit the search. Similarly, to obtain that individual's cooperation against another individual charged with possessing the same fruits is to exploit the same search. Clearly, the new evidence was the result of exploitation

of the illegal search and was not arrived at by means sufficiently distinguishable to be purged of the primary taint.

A search unlawful at its inception cannot be validated by what it turns up. Byars v. United States, 237 U.S. 28(1927).

c. In considering the "purpose and flagrancy of official misconduct" we must consider the purpose of the investigation. The officers were looking for someone who was growing marijuana on the Millington game preserve.

The fact that the first car they encountered on that day in the area at that time turned out to be the very suspects they were looking for either indicates incredibly good luck or more information than they disclosed. In either event, mere identification of suspects would not be enough. It would be necessary to find growing plants and to connect the suspects in some way to the plants.

To meet this objective, two things would be desirable : 1) actual possession of some contraband; and 2) testimony/ confession connecting the suspects with the plants. In this case, achieving the first objective would supply the leverage to obtain the second. The purpose of the misconduct was to supply the missing link in the overall investigation of marijuana being grown in the field and to permit achievement of the ultimate goal in the investigation: a confession or witness.

An analysis of the other relevant factors to be considered results in similar conclusions. The temporal proximity of the arrest and confession in the absence of intervening factors are related and should be considered together.

From the time Latham was charged and the time he began to cooperate with the police, 22 hours had elapsed. More

importantly, during the course of that time, nothing had happened to break the causal relation between the illegal search, illegal arrest and the decision to cooperate. In the words of the Court in Ryon, supra, :

> Nothing occurred to so attenuate the connection between the illegal arrest (act) and the statement as to dissipate the taint. (page 62).

In undertaking this analysis, the court must remain cognizant that it is the state which bears the burden of showing admissibility of subsequently obtained evidence.

To quote the court in Ryon, supra:

> We start with the proposition that the burden of establishing admissibility rests on the state. (page 82)

Thus, the State must show that the secondary evidence was not obtained as a result of exploitation of the primary illegal act; the State must show that some significant event intervened to so

attenuate the connection between the primary illegal act and the secondary evidence as to dissipate the taint; the State must show that the secondary evidence had been come at by means sufficiently distinguishable to be purged of the primary taint.

It did not.

The factual setting of Ryon v. State, 29 Md. App. 62, 349 A. 2d 393 (1975), was not unlike the factual setting in this case. Mrs. Ryon's arrest warrant was invalid because it lacked sufficient probable cause for its issuance. There was no probable cause to justify a warrantless arrest. Her confession was obtained during an interrogation by police while she was in custody as a result of her illegal arrest. Under Brown v. Illinois, 422 U.S. 590 (1975), a confession may be the fruit of an illegal arrest and giving Miranda warnings does not always

purge the taint of such arrest.

The Maryland Court of Special Appeals held in Ryon, supra, that the causal connection between the illegal arrest and the confession was not broken, the State failed to sustain its burden of showing the confession admissible because it was not sufficiently an act of free will to purge the primary taint of the illegal arrest as Wong Sun, supra, requires, 29 Md. App. 82; 371 U.S. 486, and the failure to exclude the confession was reversible error.

The case at hand is also analogous to Wong Sun v. United States, 371 U.S. 471 (1963). Petitioner's situation is similar to that of Johnny Yee in that case. Yee was arrested after police got his name from Blackie Toy during an invalid arrest. The Supreme Court ruled that Toy's statement was the fruit of an unlawful search, induced through

improper police action. The drugs seized from Yee were also found to be inadmissible as the result of exploitation of the illegality. The only evidence admissible in Wong Sun was that obtained through the independent source of Wong Sun, who gave a statement after release and arraignment. Because of the break in the chain of causation between illegal arrest and confession, the primary taint was purged, Wong Sun's statement became an independent and valid act.

In the case at bar, no break occurred in the chain of causation between the unlawful search and arrest and Latham's disclosure of evidence incriminating Petitioner Aukamp.

In Dunaway v. New York, 442 U.S. 200, 1979) a confession was excluded because the Defendant had been seized without probable cause, "in the hope that something might turn up and he confessed without any

intervening act of significance". The Supreme Court noted that satisfying the Fifth Amendment (testimonial due process) is only the "threshhold condition of the Fourth Amendment analysis required by Brown v. Illinois, 422 U.S. 590 (1975). "To admit Defendant's confession would allow law enforcement officers to violate the Fourth Amendment with impunity, safe in the knowledge that they could wash their hands in the procedural safeguards of the Fifth". 442 U.S. 200.

In the instant case, police were able to obtain the evidence sought by exploiting Latham's situation, which was possible only because of their initial disregard for Fourth Amendment limitations on police manipulation.

The Maryland Court of Special Appeals found that,

Latham's cooperation was produced

> by his "conversion to Christ" while in the Kent County jail. His newly found morality, and not exploitation of the illegal search, motivated the statements and actions that inculpated Aukamp....Latham's willingness to testify, in other words, was not the product of the illegal search, but of an independent cause.

This finding was based upon one of the three exceptions to the fruit of the poison tree doctrine set forth in Bartram v. State, 33 Md. App. 115, 364 A.2d 1119. The pertinent exception is set forth at page 167 of that case:

> The taint of the primary illegality must be attenuated by independent intervening causes.

Clearly, the stimulus for Mr. Latham's abrupt "conversion to Christ" was the fact of his incarceration, the prospect of a long jail term, and the heavy weight of evidence against him. Latham was in serious trouble and he was terrified. A bargain with the

Almighty is not unusual under these circumstances.

Stated simplistically, the illegal search resulted in Latham's arrest and charges. His arrest created fear which led to his "conversion to Christ". Both the fear and the "conversion" (along with the hope of saving himself from punishment) resulted in his cooperation with the State.

To say that Latham's "conversion" was the cause of his cooperation makes little enough sense. To say that it was an independent, intervening cause is absurd. It would be just as logical to cite Latham's fear as an independent intervening cause since it occupies an analogous position in the causal chain.

The Maryland Court of Special Appeals relied upon the Bartram case, supra, as well as United States v. Ceccolini, 435 U.S. 268 (1978)

to support its finding, even though the holding in Bartram was based upon the theory of inevitable discovery and the holding in Ceccolini, supra, 435 U.S. 628, was based upon information provided by a bystander in no way threatened by the investigation.

A more appropriate approach would be to analyze the facts of cases which have sought to define the nature of an independent intervening cause. Some of these cases are collated at 43 ALR 3d 385.

There is a common thread among these cases. They require that the factor cited as an intervening cause not be a direct or indirect product of the illegal search. Stated simply, the intervening cause must itself be free from taint.

In the case at bar, the intervening factor cited by the Court of Special Appeals is the accomplice's "conversion

to Christ". His "conversion" is merely a by-product of the exploitation of the illegal search. Furthermore, there is no evidence that it would have occurred had the search not taken place.

In this case, the only evidence, other than the accomplice's which attempts to link Aukamp to the marijuana in the field, is testimony by a game preserve employee that he had seen Aukamp in Zone 5 twice during the 7 months prior to his arrest. The employee also said that when he had seen Aukamp he had not been with Latham.

While corroboration does not have to be enough to convict exclusive of the accomplice's testimony, it does have to support the accomplice's testimony on material points and tend to show his complicity in the crime itself. McDowell v. State, 231 Md. 205, 189 A. 2d 611 (1963).

The officers' finding the accused in

a wildlife area hunting in the company of Latham does not suffice to show that he cultivated marijuana there, especially when Latham, also a State's witness, said they were only hunting on the day of the arrest.

Seeing the accused in the wildlife area twice, off-season, does not show that he cultivated marijuana there, when numerous other activities are lawfully pursued there off-season. State's witness Loughery said the public used the park all year long. Aukamp was not in Latham's company on either of these occasions.

The purpose of the corroboration requirement is, of course, to prevent false accusations, and will not be served unless the corroborating evidence enhances the reliability of the accomplice's criminal accusations, including agency. Reliability of peripheral testimony is not enough.

An accused cannot be convicted on the uncorroborated testimony of an accomplice, Brown v. State, 281 Md. 241, 378 A. 2d 1104 (1977); and the remaining testimony was insufficient to corroborate it.

CONCLUSION

For the foregoing reasons, this Petition for Writ of Certiorari should be granted.

Respectfully submitted,

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December 28, 1984.

APPENDIX

JAMES A. AUKAMP	)	In The
	)	
	)	Court of Appeals
	)	
	)	of Maryland
	)	
	)	Petition Docket
	)	No. 369
v.	)	
	)	September Term,
	)	1984
	)	
	)	(No. 1441, Sept-
	)	ember Term, 1983
	)	Court of Special
STATE OF MARYLAND	)	Appeals)

ORDER

Upon consideration of the petition for a writ of certiorari to the Court of Special and the answer filed thereto, in the above entitled case, it is

ORDERED by the Court of Appeals of Maryland, that the petition be, and it is hereby, denied as there has been no showing that review by certiorari is desirable and in the public interest.

/s/ Robert C. Murphy
Chief Judge

Date: October 31, 1984

UNREPORTED

IN THE COURT OF SPECIAL APPEALS

OF MARYLAND

No. 1441

September Term, 1983

JAMES A. AUKAMP

v.

STATE OF MARYLAND

Weant
Garrity
Adkins,

JJ.

Per Curiam

Filed: June 19, 1984

A jury sitting in the Circuit Court for Kent County convicted appellant James Aukamp of possession of marijuana, possession with intent to distribute marijuana, and unlawful deer hunting. Judge J. Owen Wise sentenced him to four years in prison on the drug charges but suspended all but one year in favor of five years of supervised probation. He imposed a $3,000 fine. In addition, Aukamp was fined $200 on the hunting charge.

This appeal involves the drug convictions. Aukamp says they should be set aside because they were:

1. based on the testimony of an accomplice, Steven Latham, whose testimony was the fruit of a tree poisoned by an illegal search of Aukamp's car; and

2. the product of a decision allowing Latham to testify, which decision had the effect of impermissibly restricting Aukamp's cross-examination of Latham.

Additionally, Aukamp contends that:

3. there was insufficient corroboration of accomplice Latham's testimony; and

4. Aukamp's sentence was improper because it was more severe than the sentence given Latham.

Facts

On October 14, 1982, Officer Charles Rhodes, Maryland Natural Resources Police, was at the Millington Wildlife Management Area in Kent County, He was searching for marijuana that, according to a confidential informant, was being grown in Zone 5 of that area.

Rhodes observed a green Oldsmobile in a Zone 5 parking area and saw two men with firearms heading into the woods. It was closed season; deer hunting was illegal. Nevertheless, Rhodes, accompanied by the Kent County Deputy Sheriff continued his search for the marij ana. It was unsuccessful, and about 7:00 p.m.

the two officers returned to the area where the Oldsmobile was parked. They heard a shot and soon thereafter heard a car door slam. The officers approached the Oldsmobile which contained two men, Aukamp and Latham, in hunting attire. Atop the car was a loaded black powder gun.

Rhodes asked for hunting licenses. Aukamp said he had been hunting in Delaware, which adjoins the Wildlife Management Area. He produced a non-resident Delaware hunting license. While Rhodes checked the men's hunting licenses, Thorpe walked around the car to secure the gun. He smelled the odor of marijuana and looking into the car observed a bag that contained green vegetable matter. He seized the bag. Aukamp and Latham were arrested for drug violations and were given citations for hunting deer out of season.

Aukamp and Latham appeared before

a District Court Commissioner who set bond in excess of $40,000 apiece. Neither could make bond. The police questioned them, but they were uncooperative. On October 15, however, Latham led the police to several patches of marijuana growing in Zone 5. He also made statements inculpating Aukamp. Latham's bail was then reduced to $10,000. He posted bail and was released on October 19. He pleaded guilty to four counts against him. The State agreed to nol pros five other counts. His sentencing was postponed until after Aukamp's trial.

At a suppression hearing, Chief Judge George B. Rasin, Jr., granted Aukamp's motion to suppress the material that had been seized from Aukamps' car. Later, both he and Judge Wise ruled that Latham would be allowed to testify against Aukamp and that the evidence produced by Latham's cooperation with the authorities was likewise admissible.

Fruit of the Poisonous Tree

Latham's testimony was to the effect that Aukamp had approached him about growing marijuana; that he, Latham, and two others had engaged in this enterprise in Zone 5; and that the entrepreneurs usually visited their illicit farm in Aukamp's green Oldsmobile or his 1975 Toyota Land Cruiser. He also testified that he had led the police to the marijuana plots in Zone 5 and that on October 14 he and Aukamp had been hunting in close proximity to those plots.

Aukamp now contends that all of this was the fruit of a poisonous tree -- the poison being the illegal arrest and search condemned by Judge Rasin. He argues that under Ryon v. State, 29 Md. App. 62 (1975), aff'd. 278 Md. 302 (1976), and other authorities, such as Wong Sun v. United States, 371 U.S. 471 (1963), the police exploited that illegality and

through this exploitation, aggravated by holding Latham on high bond under threat of serious punishment if convicted, they induced Latham's involuntary cooperation.

In Ryon, 29 Md. App. at 71, we explained that "[t]he Fourth Amendment exclusionary rule applies equally to statements and tangible evidence obtained following an illegal arrest or an otherwise illegal search and seizure." We noted, however, that

> [a]dmissibility of such statements, vel non, must be answered on the facts of each case, upon consideration of:
>
> (a) the voluntariness of the statement, which is a threshold requirement;
>
> (b) compliance with the Miranda [v. Arizona, 384 U.S. 436 (1966)] safeguards, which is important in determining whether the statements were obtained by exploitation of the illegal conduct;
>
> (c) other relevant factors, such as
>
> (i) the temporal proximity of the arrest and the confession;
>
> (ii) the presence of intervening circumstances; and
>
> (iii) "particularly the purpose and flagrancy of the official misconduct."

Id. at 71-72

Later, in Bartram v. State, 33 Md. App. 115 (1976), aff'd. 280 Md. 616 (1977) we identified three recognized exceptions to the fruit of the poisonous tree doctrine. One of these comes into play when the taint of the initial official misconduct has been removed by attenuation of that taint; that is where "the ultimate product [of the illegal official conduct] is so remote in terms of the chain of causation, with one or more independent intervening causes...." 33 Md. App. at 167. As the Supreme Court observed in Wong Sun:

> We need not hold that all evidence is "fruit of the poisonous tree" simply because it would not have come to light but for the illegal action of the police. Rather, the more apt question in such a case is "whether granting establishment of the primary illegality, the evidence to which instant objection is made has been come at by exploitation of that illegality or instead by means sufficiently distinguishable to be purged of the primary taint."

371 U.S. at 487-88.

We hold that in the case before us there was sufficient attenuation to permit the Latham evidence. Latham testified that his cooperation was produced by his "conversion to Christ" while in the Kent County jail. His newly-found morality, and not exploitation of the illegal search, motivated the statements and actions that inculpated Aukamp. See United States v. Stevens, 612 F. 2d 1226, 1230 (10th Cir. 1979) cert. denied, 447 U.S. 921 (1980). Latham's willingness to testify, in other words, was not the product of the illegal search but of an independent cause. See United States v. Ceccolini, 435 U.S. 268 (1978). See also United States v. Leonardi, 623 F. 2d 746, 753 (2d Cir. 1980) cert. denied 447 U.S. 928 (1980) and United States v. Scotten, 428 F. Supp. 256, 257 (d. Nev. 1976), appeal dismissed, 556 F. 2d. 590 (1977)(cooperation motivated by

self interest rather than exploitation of official misconduct).

Judge Wise did not err in admitting the Latham evidence.

Restriction of Cross-Examination

Aukamp next argues that when Latham was permitted to testify Aukamp was forced to choose between (1) referring to the suppressed evidence when cross-examining Latham or (2) abandoning the most effective line of cross-examination: that is, bringing out the strength of the evidence against Latham as the motivation for his testimony. This, says Aukamp, impermissibly restricted his right of cross-examination.

We have often stressed the importance of cross-examination "as the principal means by which the believability of a witness and the truth of his testimony are tested." Reese v. State, 54 Md. App. 281, 286 (1983). Because this right plays a critical part

in vindication of an accused's Sixth Amendment right to confrontation the trial judge's discretion to limit cross-examination is "a rather narrow one". Id. But when an appellate court is asked to reverse because of an error committed in the trial court, the error must be based on some improper action or inaction of the trial judge. Braun v. Ford Motor Co., 32 Md. App. 545, 548, cert. den. 278 Md. 716 (1976). Here, Judge Wise did not impermissibly restrict the scope of Aukamp's cross-examination of Latham.

As Judge Wise pointed out: "The extent to which the Defendant [Aukamp] and his counsel can cross-examine Mr. Latham is initially a matter for their tactical determination." Aukamp's counsel made that determination. It may well have been a difficult one, but it was made by counsel, not the court. In point

of fact, Latham was cross-examined about his conversion to Christ and other facts relating to his cooperation with the police. That this questioning did not extend to details about the suppressed materials was a tactical defense decision and is not a basis for reversal. Madison v. State, 200 Md. 1, 8-9 (1952).

Accomplice Corroboration

An accused may not be convicted on the uncorroborated testimony of an accomplice. Brown v. State, 281 Md. 241 (1977). Corroboration, to be sufficient, must tend either "(1) to identify the defendant with the perpetrators of the crime or; (2) to show the defendant's participation in the crime itself." Foxwell v. State, 13 Md. App. 37, 39 (1971). Only slight corroboration is required to show either of these matters. Oliver v. State, 53 Md. App. 490, 506, cert. den. 296 Md. 61 (1983).

Aukamp argues that there was insufficient corroboration of Latham's testimony. Latham testified that he and Aukamp had grown marijuana in Zone 5. He led the officers to the site of cultivation. We hold that this testimony was sufficiently corroborated.

The activity in question here -- the growing of marijuana-- of necessity extended over a period of time. There was evidence that marijuana was in fact growing in Zone 5, an isolated area in which we may assume, patches of marijuana would not grow naturally.

Moreover, there was evidence that the area was not frequented by many people. Yet a wildlife area employee said that he had seen Aukamp there twice in the summer of 1982, during the non-season. The same employee testified to having seen Aukamp's green Oldsmobile or Toyota in the area at least a couple of

times each month from April 1982 to the date of Aukamps' arrest. Additionally, Aukamp was in the company of Latham when arrested, and in the general vicinity of a marijuana patch. This was enough cooorob-oration to satisfy the rule.

Sentence

Accomplice Latham received a four-year sentence, five years of probation, and a $700 fine. Aukamp, as we have noted, was sentenced to four years with only three suspended, five years supervised probation, and a lerger fine. Both were first offenders. Aukamp asserts that these disparate sentences denied him equal protection of the laws in violation of the Fourteenth Amendment. We disagree.

Appellate review of a criminal sentence is extremely limited. Teasley v. State, 298 Md. 364 (1984). The sentences here were neither in excess of statutory limits nor cruel and unusual

and the trial judge had no improper motivation in his sentencing. Aukamp, moreover, is incorrect in arguing that he and Latham appeared before the court in identical postures. Among other things, there was evidence that Aukamp had been a leader of the marijuana-growing activity and Latham merely a follower. That distinction of itself is enough to support different sentences, if justification is required.

JUDGMENTS AFFIRMED.
APPELLANT TO PAY
THE COSTS.

TRIAL COURT'S RULING
ON LATHAM TESTIMONY (J. Owen Wise, Judge)

Court: With respect to Latham's testimony, the Court's interpretation of the evidence which it has heard with respect to the suppression hearing is that what drew the attention of the officers to Aukamp and Latham was the question of whether they were engaged in illegal hunting. They took them into custody, for whatever reason, at the same time. Latham's identity was known, and the fact that the Court found that the police seized evidence illegally in no way negates the fact that Latham was there, he was identified, and that the seizure of illegal evidence and even the arrest of Latham based on that illegal evidence does not result in Latham's lips being sealed with respect to other persons. Now if a search and seizure had resulted in the disclosure of Latham then there would be another basis for arguing that

the illegal search and seizure was a basis for the police discovering the identity of Latham and then Latham's subsequent cooperation being used or proffered as evidence against Aukamp. If somebody is illegally arrested during the search incident to the arrest, and a photograph or name or notebook or something discloses certain information that leads to somebody else then that is another matter, but Latham's identity was known to the police regardless of the fact that they seized evidence or placed charges as a result of that seizure. So under the circumstances of this case, any subsequent decision on the part of Latham, for whatever reason, to cooperate with the State and be willing to testify against Aukamp, in my opinion was not prevented by the fact that the Court did suppress the evidence which was seized at the time of the arrest. I think that the police perhaps just stumbled onto this situation,

and the Court found that the officers were either a little too aggressive or else the evidence and testimony didn't add up, and just felt under the circumstances I was going to grant the motion to suppress the evidence. Whereas had the true facts been the basis of the police doing what they did, as I reviewed the evidence, there might have been a different result. So the ruling at this time is that Latham's testimony will be admitted at the trial of Mr. Aukamp.

(Transcript, pages 129-130)

SUPPRESSION HEARING APRIL 12, 1983:

Ruling of court: (George B. Rasin, Jr.)

Court: Alright. Now the issue before the Court is to look at all of the facts which I have heard in the testimony and deal with the proposition of an unlawful or lawful arrest or reasonable or unreasonable search incident to an arrest. I think that for whatever reason the officers have attempted from their testimony to create the impression that they were not using the information furnished by the Harford County police officer as a basis for accosting the Defendant and Mr. Latham. Why, I really can't understand, because it seems to me that the State and the officers had other testimony that attempted to dispel any argument that they were in the area searching for persons who might lead them to a plot of marijuana growing at the Millington Game Refuge. But that they were up there looking for it, and they

were in no way connecting this Defendant and Mr. Latham with the thought and possibility that they should some way be involved or could lead them to the marijuana plot. That they saw two people carrying rifles, dressed in hunting clothes, and faces camouflaged, and therefore they were merely checking out whether these two persons were violating the hunting laws in Maryland, since it was not an open season for deer at that time. So they stayed around to check them out and observe what went on. So when they appeared around the car, and they heard noises, then they went back to the area where the two persons were, and said, "We would like to - " - the Natural Resources officer said, "We would like to check out your licenses." While he was checking out their licenses, the question is, what was Officer Thorpe doing ? Was he assisting Officer Rhodes

in determining whether there had been a game violation, or was he doing something else ? Mr. Latham says that he went around to the right side of the car - the passenger's side of the car - and opened the door and was looking into his hunting clothes, then closed it, and immediately went around to the other side and opened the door and grabbed a bag. Sgt. Thorpe says the driver's side of the car door was open and the bag was open and the headlights were shining sort of at an angle and he had a flashlight and he saw a bag that to him meant to him this green vegetable substance and it had the odor, and that the smell of marijuana causes his nose to run and his eyes to burn. So the Court has to decide this matter on credibility as related to a search incident to an arrest, and in the process of assisting

Rhodes, and the reasonable inference is, or logical inference is, that they would be the only basis for it, as I interpret this testimony, in looking for some wildlife contraband - rifles or other weapons or parts of a deer. Of course I did make the comment that you could get a deer carcass in a car, but I don't think you could - I think you could get it in the back seat or in the trunk, but a whole deer would be rather obvious and open view or plain view I don't suppose would be any question. But I think there was a comment made, from the experience that we have had, from people hunting deer illegally at times they do cut up the deer and take the choice parts. As Mr. Saunders suggested, I don't think the Court can find that Officer Thorpe thought that there were any parts of a deer in the paper bag, whether it was open or closed. So I think what I have

to do is decide whether Officer Thorpe, in assisting Officer Rhodes, in looking through that car, was looking for evidence of a game violation during the course of that assist, and through his senses, either through his smell or through his sight, was then alerted to another possible violation totally unrelated to the game laws, and that is the controlled dangerous substance laws. Under the circumstances of this case I am coming down on the side of the seizure of contraband relating to controlled dangerous substances without probable cause. I think that the State would had a much stronger case if the seizure of these goods - if the evidence pointed to acting on the report from the Harford County officer. Becuase if that had been the posture of this hearing, frankly I would have no difficulty in finding that out in an open area like that the

officers had sufficient probable cause to look inside - not to open the car, but to make the inspection that they made and then seeing the green - that's the thing that bothers me. I can't understand Officer Thorpe mentioning that there was green vegetable substance, because that is the terminology that they always use --green vegetable substance. I think that was sufficient for them to stake out the car and make the observations that they made and smell the odors. My sense of fairness in this case tells me that I have to grant the suppression motion. So I will grant the motion.

END OF SUPPRESSION HEARING

(Transcript p. 111-114)

STATE OF MARYLAND	*	IN THE CIRCUIT COURT FOR
v.	*	KENT COUNTY, MARYLAND
JAMES AUKAMP	*	CRIMINAL NO. 3007

MOTION TO SUPPRESS EVIDENCE

COMES NOW the Defendant, by his attorney, C. Daniel Saunders, and moves to quash the search warrants issued which authorized searches of the Defendant's person, his home and his automobile; and to suppress as evidence the articles seized by means of such searches and articles seized by means of warrantless searches of the Defendant, his home and his automobile. The grounds of this motion are:

1. The warrants were illegally executed.

2. The warrants were insufficient on their faces.

3. The affidavits upon which the warrants were issued contained false

representations of fact.

4. The property seized was not sufficiently described by the warrants.

5. There was no probable cause for believing the existence of the grounds upon which the warrants were issued.

6. There was no probable cause upon which to conduct warrantless searches.

7. And for such other and further reasons as may be assigned at the hearing of this mation.

8. The trial of these cases on the merits will be lengthy and time-consuming, involving testimony of numerous witnesses and experts on both sides.

9. The Court's holding on this Motion may be dispositive of all of the issues.

10. It is in the interest of the Defendant as well as the State that this matter be specially set prior to the trial on the merits.

11. The issuing Judge has already formulated an opinion as to whether or not the application for the warrants states probable cause on its face, and in order to ensure absolute objectivity in consideration of these matters, another judge should be assigned to hear this Motion.

WHEREFORE your Movant pravs:

1. The hearing on this motion be specially set prior to the trial on the merits at a time when a judge other than the issuing judge is sitting.

2. This Honorable Court quash the search warrants.

3. This Honorable Court suppress any and all evidence obtained by such warrants.

4. This Honorable Court suppress any and all evidence obtained by means of warrantless searches.

/s/
C. Daniel Saunders
Attorney for Defendant

Points in Authority:

Maryland Rule 707a
Weeks v. United States, 34 S. Ct. 341
Mapp v. Ohio, 81 S. Ct. 1864
Silverthorn Lumber v. United States,
30 S. Ct. 182
Jones v. United States, 80 S. Ct. 725
Kleinbart v. State, 2 Md. App. 183
Goodman v. State, 178 Md. 1
Adams v. State, 200 Md. 133
Howard v. State, 199 Md. 529
Article 27 §551, Maryland Annotated Code.

I HEREBY CERTIFY that on this 10th day of Feb., 1933, a copy of this Motion to Suppress was mailed to the Office of the State's Attorney, Chestertown, Maryland.

/s/
C. Daniel Saunders